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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 830

HUMBLE OIL & REFINING COMPANY,
Petitioner,

versus

NOAH S. CUTRER AND NICHOLAS D. OLIVIER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CHARLES JANVIER,
Commerce Building,
New Orleans, La.,

L. K. BENSON,
H. H. HILLYER, JR.,
Whitney Building,
New Orleans, La.,
Counsel for Petitioner.

BERNARD J. CAILLOUET,
W. J. McANELLY, JR.,
ANDREW McCOLLAM, JR.,
New Orleans, La.,
Of Counsel.

HAUBER PRINTING CO., INC., NEW ORLEANS

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NOAH S. CUTRER AND NICHOLAS D. OLIVIER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on November 28, 1962.

CITATIONS TO OPINIONS BELOW

The two opinions of the United States District Court for the Eastern District of Louisiana (R. 415-418; 540-552) are reported at 192 F. Supp. 757 and 202 F. Supp. 568, and are printed in Appendix B hereto, *infra*, pp. 31-43. The *per curiam* opinion of the Court of Appeals is reported at 309 F. (2d) 752 and is printed in Appendix B hereto, *infra*, p. 44.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1962 (R. 585). Rehearing was duly applied for and was denied on January 7, 1963, R. 596. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a court of the United States sitting in Louisiana, in a case in which its jurisdiction is based solely on diversity of citizenship, may award equitable relief to plaintiffs in a matter in which the Louisiana courts, were the matter there tried, would deny all relief?

2. Whether, in such case, the United States court may disregard the substantive law of the state as to the effect upon a lessee's obligations of the lessors' failure to deliver possession of leased premises so as to impose on the lessee obligations which could not be imposed by the Louisiana courts?

3. Whether, in such case, the United States court may disregard the plain language of the lease contract so as to deprive the lessee of the benefits of a contractual stipulation for which the lessee had paid ample consideration?

4. Whether, in such case, the United States court may, as a basis for awarding equitable relief, speculate upon the meaning of a state statute, not in terms applicable, and not theretofore so construed by the state courts?

STATUTES INVOLVED

The statutory provisions involved are Articles 1901, 1946, 1963, 2692, 3437 and 3498 of the Louisiana Civil Code of 1870, Article 3664 of the Louisiana Code of Civil

Procedure, and La. R.S. 30:105-108. They are printed in Appendix A, *infra*, pp. 21-23.

STATEMENT

A complaint was filed by Noah S. Cutrer and Nicholas D. Olivier ("respondents") on March 9, 1959, as lessors under a mineral lease held by Humble Oil & Refining Company ("petitioner"), as lessee, for cancellation of the lease on various asserted grounds, and, alternatively, for an accounting of royalties claimed to be due on production from the leased premises. The jurisdiction of the District Court was invoked on the ground of diversity of citizenship and amount in controversy under 28 U.S.C. Section 1332(a)(1).

In support of their claim for cancellation, respondents alleged practically every ground known to the law (R. 3), but on the trial the allegations were not supported by the proof.[1] Nevertheless, the District Court ordered petitioner to execute an immediate release of its mineral lease insofar as it affected a portion of the leased premises (R. 552-553), ordered it to drill within 90 days on another portion of the leased premises or suffer the loss of its lease thereon (R. 553-554), and as to still a third portion, which the court found to have been developed, the court ordered petitioner to pay royalties attributable to the land area to respondents (R. 554-556) (which petitioner had repeatedly offered to do (R. 387-391)) and ordered petitioner to pay into an escrow account royalties

[1] Thus, as to the claim of lack of production within the primary term, the District Court found that production had been obtained (R. 543, Op.). As to the claim that petitioner violated the lease by entering into the operating agreement, the Court found that claim not supported (R. 543, Op.). As to the claim of lack of reasonable development, the Court and respondents' own expert both found that development had proceeded rapidly (R. 543, Op.; R. 547). As to the claim of drainage, respondents' own expert admitted there had been none (R. 452-453, 457; R. 489; R. 499).

attributable to a portion of the disputed water covered area (R. 557-559). It is from these affirmative provisions of the judgments below (except as to the payment of royalty on land) that petitioner seeks relief.

The problems here result from the fact that although respondents claim to own, and the District Court held that the lease nominally covers, an area of some 1920 acres, all but about 100 acres are submerged beneath the waters of a bay or sound of the Gulf of Mexico (R. 541, Op.; R. 288; H-26, H-30), and the ownership of such submerged area is claimed by the State of Louisiana adversely to the respondents.[2] Not only was possession of these submerged areas never delivered to petitioner by respondents as required by Louisiana law,[3] but at the time petitioner acquired its lease, and at all time since, such water bottoms have been in the adverse possession of mineral lessees of the State of Louisiana, Gulf Oil Corporation ("Gulf") and Estate of Wm. Helis ("Helis") (R. 545-546, Op.).[4]

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[2] While the District Court questioned whether the water bottoms were "adversely claimed" within the meaning of petitioner's lease, it is indisputable that the State "claims to own" these water bottoms. The State has asserted such claim by Constitutional and legislative enactments. *Cf.* La. Act 189 of 1910; La. Act 258 of 1910; Art. 4, Sec. 2, La. Constitution of 1921. The Attorney General of the State asserted on the stand that the State owns these water bottoms (R. 351-357). The State has leased these water bottoms and its lessees have drilled many producing wells thereon and are possessing same against the world (*Cf.* R. 504-505; R. 541-542, Op.).

[3] Art. 2692, La. Civil Code. See discussion, *infra*, pp. 10-11.

[4] The District Court, curiously enough, "divided" the State lease into areas for the purpose of discussing the possession exercised by Gulf under said lease. Nothing in the law of Louisiana authorized such a division. State Lease No. 195 covered all of these water bottoms, within and without the joint area. There being no physical or legal separation of the water bottoms to interrupt the continuity of the leased premises, possession of part of the State leased premises operated as possession of all of the State leased premises, including the water bottoms in the joint area. Arts. 3437, 3498, La. Civil Code; *Bernstine v. Leeper*, 118 La. 1098, 43 So. 889; *Tremont Lumber Co. v. Powers & Critchett Lumber Co.*, 173 La. 937, 139 So. 12. *All* of the water bottoms were adversely possessed when petitioner entered into the joint operation, the State's lessees did not therein agree to attorn to respondents as to the water bottoms; therefore, the character of possession was not changed.

Yet petitioner had paid a substantial cash bonus (R. 321) for its rights therein, petitioner had annually paid substantial delay rentals on the whole area during the primary term of the lease (R. 209, 218; Pltfs' Admission No. 3), and the lessors had expressly warranted their title in the lease. Petitioner has, therefore, maintained throughout that, even though the water bottoms be adversely claimed and adversely possessed, petitioner's lease covers and attaches to whatever title respondents own; that petitioner is entitled to the benefits of the agreement for which it paid serious consideration; and that respondents must first place petitioner in peaceable possession of such areas before any of the obligations of the "lessee" under petitioner's mineral lease could come into play. A demand for possession was made by petitioner upon respondents during the primary term of the lease, but without avail (P-7).

In order that petitioner might perpetuate its rights under its mineral lease (H-3) in accordance with the terms thereof, it was necessary that a well be commenced on the leased premises within the primary term and that production in paying quantities be established. It was impracticable to drill upon the meagre land area of the geologically attractive portion of the leased premises (R. 481-483)—the land area being the only portion not in the adverse possession of the State's lessees. Since respondents refused to join in an agreement which would have permitted development without prejudice to their title claims (R. 379-380), since there had been a great increase in the geological merit of the area due to nearby successful drilling, and since any attempt to obtain any relief from respondents would have been obviously futile, resort was had to the Louisiana Department of Conservation for the creation of a pattern of drilling units

covering the known productive sands, and for force-pooling of property ownerships within the units.

At the same time petitioner entered into an operating agreement (H-5, 6, 17, 18) with Gulf and Helis covering an area of joint interest consisting of those of the proposed units which contained land, the area being referred to as the "joint area". This operating agreement affected only the "working interest" within the joint area; it did not affect or prejudice either respondents' title claims or their royalty interest (R. 543, Op.).

The Commissioner of Conservation adopted the suggested pattern of units and issued orders covering several of the then known productive sands (H-7, 8, 9; *cf.* R. 461). Since these orders force-pooled all ownerships within each respective unit, and since the joint operation held lease coverage from all possible claimants, it became possible to drill upon the area in spite of the title dispute. Gulf, having been appointed "Operator" by the Commissioner, and named as such in the agreement, drilled on a land mass known as "Stone Island", and secured production in paying quantities from the leased premises prior to the expiration of the primary term (R. 543, Op.).

Meanwhile, during the last year of the primary term of petitioner's lease, respondents, scenting the enormous increase in values that was about to occur, asserted a forfeiture of the lease on the untenable ground that petitioner had violated its lease by entering into the operating agreement (P-6) (which assertion has never been withdrawn (R. 325)), demanded payment by petitioner of royalties on wells drilled by Gulf on water bottoms outside of the joint area with which petitioner had not the remotest connection (P-5), and filed an injunction

proceeding in a state court against Gulf to prevent Gulf's drilling on either land or water (H-19, 20, 96). Gulf answered in the state court proceeding and asserted the State's claim to water bottoms and its rights as lessee thereof (H-96). Petitioner intervened in said proceeding for the protection of its rights. The state court suit still pends; it is the only extant suit in which respondents' title might possibly be established. It is obvious that the instant suit will not serve such purpose since the indispensable adversary is not present.[5]

Because of still other suits in the state court which respondents had theretofore filed against a third group of adverse claimants (H-21, 22), petitioner could not safely make payment of royalty to respondents, even royalties attributable to the land area, until said suits were settled in February of 1959. Upon being advised of the settlement, petitioner promptly computed and tendered royalties attributable to the land (R. 387-391; H-10, 23, 24, 25) withholding such as were attributable to the adversely claimed water covered area, as was expressly permitted by its lease (H-3, par. 10).[6]

As will be hereinafter shown (*infra*, pp. 10-11), the law of Louisiana places the burden on the lessor, before any duty is owed by the lessee, to put the lessee in peaceable possession of the leased premises and so to maintain him during the continuance of the lease. (In addition an express warranty of title was here stipulated

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[5] It is clear that no determination of the extant of respondents' title could be made unless either the State Mineral Board or the State's lessees were made a party. This may not be done here, for it would destroy diversity, respondents, the Mineral Board and one of the lessees being Louisiana citizens.

[6] The lease provision is express and clear, if read as directed by Articles 1901 and 1963 of the Louisiana Civil Code, *infra*, Appendix A. The District Court expressed doubts as to its meaning, but did not finally determine the question, being content with its declaration of "equity" (R. 550-551, Op.).

by respondents (H-3, par. 10).) Until the lessor performs his primary obligation of putting the lessee in possession, the obligations of the lessee under the lease are suspended, including any obligation to drill upon the premises or to pay royalties on production therefrom (*infra*, pp. 10-11). Further, it is not the duty of the lessee to protect the premises against adverse possessors.

Here, third persons were in possession of the water covered areas and petitioner never had possession thereof. Accordingly, when the District Court ordered what is tantamount to a cancellation of the lease for petitioner's asserted failure to comply with the obligations of the lease,[7] the court, in its zeal to do "equity", put the cart before the horse. The asserted obligations of the lessee simply did not exist under the plain law of the State, and petitioner was entitled to retain its lease rights for what they were worth until the lessors complied with their primary obligation and put petitioner in possession.[7a]

As to the payment of royalty, the contract of lease was express; petitioner was granted the right to withhold, without liability of interest, and so long as an adverse claim existed, royalties attributable to property

[7] It is worthy of note that, although the court found the lessors' claims to water bottoms extremely precarious, nevertheless, it ordered petitioner to assume the risk of spending thousands, perhaps hundreds of thousands, of dollars drilling on such "watery" titles or release its lease, and, because petitioner had not theretofore assumed such risk, ordered the immediate release of other portions of the leased premises. It is difficult to perceive how "equity" requires such a result when the whole situation stems from the *lessor's* initial failure to deliver possession.

[7a] As has been shown, respondents (lessors) have filed an action in the state court against the lessees of the State, in which petitioner has intervened and asserted its rights under its lease; rights which petitioner bought and paid substantial sums for, and to which the lessors warranted their title. Yet the effect of the decree below is deprive petitioner of its rights so that if its lessors are successful in maintaining their title in the state court they will have obtained their lessee's money for these portions of the property while giving nothing in return. And all because of *their initial failure to comply with their principal obligation under the lease and their express warranty.* Wherein this result is "equitable" the courts below have not explained.

adversely claimed (H-3, par. 10).[7b] Under Louisiana law the contract is the law between the parties and its plain language may not be disregarded in pursuit of equity or some less than prohibitory statutory purpose (see, *infra*, pp. 12-13). Here there was an adverse claim asserted, and asserted in various ways—by the legislative acts (R. 541, Op.), by contracts covering the property (R. 541-542, Op.), by the officials charged by law with making such claims, and last but not least, by the State's lessees in a lawsuit provoked by these very respondents (H-96). Yet the District Court, again impelled by equitable considerations, decided to override the contract and refuse to permit petitioner to enjoy the benefits for which petitioner had contracted and paid.

It is believed that the decisions of the District Court and the Court of Appeals on these points stemmed from a failure to recognize the limitations placed upon federal equity powers by the decisions of this Court, and from a failure to recognize the serious encroachments which these decisions made upon the law of Louisiana.

REASONS FOR GRANTING THE WRIT

The decisions of the courts below, under the guise of awarding equitable relief, disregard the plain language of the Louisiana Civil Code, and are in conflict with decisions of the Louisiana Supreme Court and intermediate state appellate courts. The result is that the respondents were awarded relief for reasons of "equity" when, under the substantive law of the state, no relief would have been awarded by a state court.

It is recognized by petitioner that the fact that the decisions below were wrong may not alone be sufficient to warrant the issuance of the writ. However, the im-

[7b] See Appendix C, *infra*, p. 45.

portance of the decisions below rests, not only on their conflict with state law, but on their association with a stream of lower court equity jurisprudence which departs discernibly from the direction given it by this Court's decision in *Guaranty Trust Co. v. York*, 326 U.S. 99. It is respectfully suggested that the Court might well utilize the instant case as a vehicle for the expression of more precise guidelines for the lower courts in diversity cases in the exercise of their equity powers in conformity with state substantive law.

Yet in order effectively to show the extent of the lower courts' departures, it is necessary, first, to explain the state law and, incidentally, to demonstrate the "wrongness" of the results. In so doing, the details, as near as may be consistent with clarity and fair statement, will be compressed into conclusions.

I.

THE DECISIONS BELOW ARE IN CONFLICT WITH LAWS OF LOUISIANA:

A. *As to the imposition on the lessee of obligations concerning premises never delivered to the lessee.*

Article 2692 of the Louisiana Civil Code (*infra*, Appendix A) imposes upon the **lessor** the duty of delivering the thing leased to the lessee and of maintaining the lessee in peaceable possession thereof. In addition, the lessor here expressly warranted the lessee's title and possession (H-3, par. 10).[7c] The evidence is clear, and the lower courts recognized, that the lessors here never delivered possession of any water covered areas to the lessee.[8] Under the uniform jurisprudence of Louisiana, **no obli-**

[7c] See Appendix C, *infra*, p. 45.
[8] See note 4, *supra*.

gation as to such portion is owed by the lessee until placed in peaceable possession thereof. Yet the district court (1) ordered the release of portions of the adversely possessed water bottoms for failure to drill thereon, (2) ordered the lessee to drill upon other portions under penalty of forfeiture of such portions, and (3) ordered the lessee to pay royalties (rent)[9] on other portions, albeit into escrow.

Had the case arisen in the state courts, a state district court would have been bound to apply to items (1) and (2) not only Article 2692 of the Louisiana Civil Code, but also the direct holding of the Supreme Court of Louisiana in *Slack v. Riggs*, 177 La. 222, 148 So. 32, that the failure of the lessor to protect against disturbance of possession excuses the performance of a drilling obligation. As to the payment of royalty (item 3), a state district court would have been bound to follow not only Article 2692 but also the direct holdings in *O'Rourke v. Fulton Bag & Cotton Mills*, 133 La. 955, 63 So. 480; *Board of Com'rs of Orleans Levee District v. Dalton*, 19 La. App. 490; and *Siracusa v. Leloup*, 28 So. (2d) 406 (La. App.) and to have ruled that the adverse possession excused the payment of rental or royalty.

Thus, the decisions below, in requiring drilling on adversely possessed premises, and in requiring the payment of rent as to premises adversely possessed, are in decisional conflict with the jurisprudence of the Louisiana courts of last resort, as well as in conflict in principle with the civilian law of lease as found in the Louisiana Civil Code.

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[9] The Articles of the Louisiana Civil Code dealing with lease are applicable to mineral leases, and royalty is treated as rent. *Milling v. Collector of Revenue*, 220 La. 773, 57 So. (2d) 679; *Melancon v. Texas Company*, 220 La. 593, 89 So. (2d) 135.

B. ***As to depriving the lessee of the benefit of the plain language of a contract.***

Article 1901 of the Louisiana Civil Code (*infra*, Appendix A) provides that "agreements legally entered into have the effect of laws on those who have formed them • • • ." Article 1963 states that when "the intent of the parties is evident and lawful, neither equity nor usage can be resorted to, in order to enlarge or restrain that intent, nor can any law operate to that effect, unless it be some prohibition or other provision, which the parties had no right to renounce" (*infra*, Appendix A). Further, in interpreting a contract (Article 1946, *infra*, Appendix A) the words " • • • are to be understood, like those of a law, in the common and usual signification, without attending so much to grammatical rules, as to general and popular use".

Here, the lessee bargained for, paid for and obtained a contractual right to the effect that, in the event of adverse claim to any part of the premises, the lessee might withhold royalties, retaining same in its possession without payment of interest. It was proved below that an adverse claim, in ordinary parlance, existed as to all water bottoms,[10] and that such adverse claim had been judicially asserted in response to a state court trespass action filed by these plaintiffs against the State's lessees, which action is still pending.[11] The trial court held that the lessee "should not be compelled to assume the risk of making these royalty payments to the lessee until" the lessors' "title to the submerged portions of the lease

[10] See note 2, *supra*.

[11] In defense of said suit, the State's lessees have set up the State's claim of title to water bottoms and their claims under the State lease (H-96; see Appendix C, *infra*, pp. 46-47). The State's lessees enjoy the right so to do under Art. 3664, La. Code of Civil Procedure. The District Court did not explain why it entertained doubt as to the sufficiency of this judicial assertion as an "adverse claim". Certainly, it appears to meet every known test to which the phrase "adverse claim" could be subjected.

is confirmed" (R. 549, Op.). The court found that the State's lessees were claiming a lease on the water bottoms and that the claim was "far from frivolous" (R. 549-550, Op.). The court then speculated that the term adverse "claim" as used in the lease "must **probably** be understood" as including only a claim judicially asserted" (R. 550, Op.) and that the claim asserted in the state court trespass action as to the State's title to the water bottoms **"may not** be sufficient" (R. 550, Op.). (Emphasis added.)

On the basis of these two bits of speculation as to the state law, **but without determining the state law,** the court re-wrote petitioner's lease contract and required petitioner to pay the royalties into escrow because "equity" so required. Had the matter arisen in a state court, the State court would have been bound, under the plain language of the Civil Code, to enforce the contract **as written,** unless it could find that a law expressly forbade the enforcement of such provision (*Cf.* Arts. 1901, 1963, *supra.*).[12] Here, the lower court **could not** make a finding that the lease clause was illegal; nothing in Louisiana law reasonably suggests such a result. The lower court **could not** make a finding that judicial assertion was, as a matter of law, required; only a strained extrapolation of a Louisiana statute not in terms applicable[13] could reach such result. The lower court **could not** find that the assertion of the State's title by the

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[12] " * * * we do not consider that the Court has any right to substitute its personal judgment as to what is equitable when positive law has spoken and told the parties what their legal rights are". *Bryson v. Lee,* 181 La. 1019, 1022, 160 So. 797, 798. See also: *Larguier v. White,* 33 La. Ann. 156; *Weir v. Glassell,* 216 La. 828, 848, 44 So. (2d) 882, 889.

[13] La. R.S. 30:105, et seq. The District Court took into account that La. R.S. 30:108 would make La. R.S. 30:105, et seq., inapplicable to a claim of State ownership (R. 553). It failed to recognize that the inapplicability removed its own doubts as to the necessity of judicial assertion of this adverse claim. Be that as it may, under the structure of Art. 1963 of the Civil Code, the statute may not affect the plain words of the contract, for the statute does not prohibit such an agreement. See Appendix A, *infra,* pp. 21-23.

State's lessees in the trespass suit filed by these plaintiffs was not an adverse claim; nothing in the state law suggests such a conclusion.[14] The Court deprived petitioner of the benefits of its contract, not because it found that the clause did not apply, but because it thought that "equity" would be done thereby.

The lower court also retained jurisdiction to dispose of the escrow fund (R. 557-559). Since such disposition necessarily must depend upon the determination of the question of title; since the question of title can not be determined in this proceeding, and must be determined in the state courts;[15] and since the existing litigation provoked by the respondents in the state courts is the most logical place for such determination.[16] it seems strange indeed that the Court was unwilling to treat the assertion of title in said proceeding as an adverse claim.

2.

THE DECISIONS BELOW ARE IN CONFLICT WITH THE PRINCIPLE OF GUARANTY TRUST CO. V. YORK. IT IT TIMELY THAT THIS COURT RE-STATE THE EXTENT OF FEDERAL EQUITY POWER IN DIVERSITY CASES.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-109, it is stated:

> " * * * since a federal court adjudicating a State-created right solely because of the diversity of

[14] The District Court never explained the cause of its doubt. In an otherwise carefully annotated opinion, it cited no authority.

[15] As explained, *supra*, note 5, there is no diversity between the adversaries in a test of respondents' titles. Certainly respondents cannot determine them against their own lessee.

[16] Since it has jurisdiction of the adversaries and the State's lessees have raised the title issue. The District Court expressly recognized this (R. 551).

> citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recovery is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

Again, it is said (326 U.S. 109):

> "* * * the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

It is believed that, for diversity cases, the above case completely destroyed the so-called "equitable remedial rights doctrine";[17] that in such cases the federal court could not, by the use of its equity power, give to the parties other than "the same substantial treatment they would get in the state court"; that if relief would be denied the plaintiff in the state court the federal court could not award relief, even though some equitable consideration might dictate otherwise. But the language of the opinion in *Guaranty Trust Co. v. York* sowed its own seeds of uncertainty. For example, it says that "a federal court may * * * afford an equitable remedy not available in a State court" (326 U.S. 105); and, in footnote 3 (326 U.S. 106), the case of *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, is cited with evident approval—

[17] 2 Moore's Federal Practice (2d Ed.) 454. However, the author also states: "Mr. Justice Frankfurter, speaking for the majority, did not, however, repudiate the remedial rights doctrine; on the contrary much of his language is susceptible of being interpreted as an endorsement of the doctrine, but it need not be so construed." (p. 453).

a case which had followed the equitable remedial rights doctrine. Because of these, and similar, apparent paradoxes, litigants and lower courts have mistaken the true teaching of *Guaranty Trust Co. v. York* and the courts have exercised powers at variance with state law.

To illustrate the confusion as to the extent of the holding in *Guaranty Trust Co. v. York* that has existed, and still exists after almost 18 years, reference to a cross section of its progeny is revealing. At the District Court level, there may be found numerous misapprehensions as to its teaching which had to be corrected by the Courts of Appeals. See, *e.g.*, *Austrian v. Williams*, 198 F. (2d) 697, 700-701 (C.A. 2), cert. den. 344 U.S. 909; *Macias v. Klein*, 203 F. (2d) 205, 207-208 (C.A. 3), cert. den. 346 U.S. 827; *Phelan v. Middle States Oil Corporation*, 220 F. (2d) 593, 616 (C.A. 2), cert. den. 349 U.S. 929; *Mayer v. Chase National Bank*, 233 F. (2d) 468, 470 (C.A. 2), cert. den. 352 U.S. 841; *Chamberlain v. Lowe*, 252 F. (2d) 563, 565 (C.A. 6); *Mintzer v. Arthur L. Wright Co.*, 263 F. (2d) 823, 825 (C.A. 3); *Aponte v. American Surety Co.*, 276 F. (2d) 678, 680 (C.A. 1); *Tracy v. Finn Equipment Co.*, 290 F. (2d) 498, 500 (C.A. 6); *Hardware Dealers Mutual Fire Insurance Co. v. Smart*, 293 F. (2d) 558, 560-561 (C.A. 10).

Decisions of the Courts of Appeals evidence the difficulties of application encountered by them, difficulties which extended even to failure to follow. See, *e.g.*, *Franke v. Wiltschek*, 209 F. (2d) 493, 496-497, 500-502 (C.A. 2); *D'Onofrio Construction Company v. Recon Company*, 255 F. (2d) 904, 907-911 (C.A. 1); *Oroz v. American President Lines*, 259 F. (2d) 636, 638-640; *Gulf Oil Corporation v. Bivins*, 276 F. (2d) 753, 762 (C.A. 5), cert. den. 364 U.S. 835; *Jaftex Corporation v. Randolph Mills, Inc.*,

282 F. (2d) 508 (C.A. 2); *Hope v. Hearst Consolidated Publications, Inc.*, 294 F. (2d) 681, 692 (C.A. 2), cert. den. 368 U.S. 956; *Maryland Casualty Co. v. Hallatt*, 295 F. (2d) 64, 68-69 (C.A. 5), cert. den. 369 (U.S. 819; *McNamara v. Dionne*, 298 F. (2d) 352, 355 (C.A. 2).

This Court has, in turn, found it necessary to correct the Courts of Appeals in their interpretations of the ruling. See, *e. g.*, *Holmberg v. Armbrecht*, 327 U.S. 392; *Woods v. Interstate Realty Co.*, 337 U.S. 535; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Byrd v. Blue Ridge Rural Electric Co-op.*, 356 U.S. 525; *Clay v. Sun Ins. Office*, 363 U.S. 207. Indeed, in the opinions of this Court serious questions have been raised as to the extent to which the rule should be carried. See, *e.g.*, *Holmberg v. Armbrecht*, *supra*, at p. 398 (concurrence); *Woods v. Interstate Realty Co.*, *supra*, at pp. 538-540 (dissent); *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, at pp. 557-561 (dissents); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 212-213 (dissent); *Bank of America Nat. T. & S. Asso. v. Parnell*, 352 U.S. 29, 35 (dissent).

With this background it is not remarkable that the lower courts have, on occasion, failed to discern that their equitable powers, in diversity cases, had been restricted by state law, and that such courts have not always conformed to the state law when the conscience of the chancellor was aroused. For example, in *Austrian v. Williams*, *supra*, the opinion shows that the lower court had erroneously supposed that it should enforce equitable principles instead of state law. In *Franke v. Wiltschek*, *supra*, Judge Frank's dissent clearly poses the quandary as to the extent to which the equitable remedy therein sought was governed by state law; the majority applied

the state law as controlling the equitable remedy. In *Hertz v. Record Publishing Company*, 219 F. (2d) 397, 398 (C.A. 3), cert. den. 349 U.S. 912, the Third Circuit cites *Guaranty Trust Co. v. York* to support the statement that "Federal remedies are not limited or affected by state law". In *Ball v. Victor Adding Machine Company*, 236 F. (2d) 170, 174 (C.A. 5), *Guaranty Trust Co. v. York* is cited to support the boundless power of equity to create remedies unknown to the state. Indeed, in *Guaranty Trust Co. v. York* itself the opinion refers to a federal court affording equitable relief "not available in a State court" (326 U.S. 105), and to affording "an equitable remedy for a substantive right recognized by a State even though a State court can not give it" (326 U.S. 106).

It is in this context of uncertainty that the instant case fits. The lower courts here saw nothing wrong in administering, under their broad equitable powers, equitable relief which the substantive law of the state denied—apparently, they still considered that the "equitable remedial rights doctrine" retained some vigor. Yet *Guaranty Trust Co. v. York*, as Moore explains,[18] completely did away with the doctrine, and no equitable remedy is now available in the federal court if a substantially similar remedy would be denied by state law. Considering the evident confusion in the lower courts, and what appears to be a discernible tendency on the part of the district courts to administer historical equity rather than comply with *Guaranty Trust Co. v. York*, it seems appropriate that this Court now re-state the meaning of *Guaranty Trust Co. v. York* in its relation to the whole subject of equitable remedies. And if such restatement accords with the interpretation advanced by Moore, the judgment below must be reversed.

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[18] *Id.*, at pp. 454-456.

3.

THE DECISIONS BELOW ARE BASED IN PART ON UNNECESSARY SPECULATION AS TO THE MEANING OF STATE LAW, A PRACTICE WHICH THIS COURT SHOULD DISAPPROVE.

As above shown the only reason given by the District Court for disregarding the language of the mineral lease respecting withholding of royalties was that court's speculation on the probable effect of a state statute, in terms not applicable to the situation here.[19] Considering that the Court never, in point of fact, determined the applicability of the statute; considering that the federal courts are reluctant to construe such a statute prior to construction by the state courts;[20] and considering that the "probable" construction advanced by the District Court casts a cloud on many existing Louisiana mineral leases; it is fitting that this Court should now declare such practice improper and as affording no reason for the exercise of equitable powers in derogation of the contract of the parties.

CONCLUSION

For all of the foregoing reasons, his petition for a writ of certiorari should be granted.

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[19] See note 13, *supra*. The District Court's holding is based on considerations of equity, not on its construction of the statute, and its uncharted voyage upon the State law was unnecessary. Unless required by the situation, a federal court "should not speculate upon what these tribunals would decide if confronted by these problems." See *Borg v. Boas*, 231 F. (2d) 788, 794 (C.A. 9).

[20] *Cf. Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25; *Leiter Minerals v. U. S.*, 352 U.S. 220.

Respectfully submitted,

CHARLES JANVIER,
Commerce Building,
New Orleans, La.,

L. K. BENSON,
H. H. HILLYER, JR.,
Whitney Building,
New Orleans, La.,
Counsel for Petitioner.

BERNARD J. CAILLOUET,
W. J. McANELLY, JR.,
ANDREW McCOLLAM, JR.,
New Orleans, La.,
Of Counsel.

February 15, 1963.

APPENDIX A

STATUTES INVOLVED

I. LOUISIANA CIVIL CODE ARTICLES:

Art. 1901. Agreements legally entered into have the effect of laws on those who have formed them.

They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law.

They must be performed with good faith.

Art. 1946. The words of a contract are to be understood, like those of a law, in the common and usual signification, without attending so much to grammatical rules, as to general and popular use.

Art. 1963. When the intent of the parties is evident and lawful, neither equity nor usage can be resorted to, in order to enlarge or restrain that intent, nor can any law operate to that effect, unless it be some prohibition or other provision, which the parties had no right to modify or renounce.

Art. 2692. The lessor is bound from the very nature of the contract, and without any clause to that effect:

1. To deliver the thing leased to the lessee.

2. To maintain the thing in a condition such as to serve for the use for which it is hired.

3. To cause the lessee to be in a peaceable possession of the thing during the continuance of the lease.

Art. 3437. It is not necessary, however, that a person wishing to take possession of an estate should pass over every part of it; it is sufficient

if he enters on and occupies a part of the land, provided it be with the intention of possessing all that is included within the boundaries.

Art. 3498. When a person has a title and possession conformably to it, he is presumed to possess according to the title and to the full extent of its limits.

II. LOUISIANA CODE OF CIVIL PROCEDURE ARTICLES:

Art. 3664. A mineral lessee or sublessee, owner of a mineral interest in immovable property, owner of a mineral royalty, or of any right under or obligation resulting from a contract to reduce oil, gas, and other minerals to possession, is the owner of a real right. These rights may be asserted, protected, and defended in the same manner as the ownership or possession of immovable property, and without the concurrence, joinder, or consent of the owner of the land.

III. LOUISIANA REVISED STATUTES SECTIONS:

R.S. 30:105. It shall be unlawful for a person acquiring mineral rights from, or mineral rights under a lease by, the last record owner and holding under an instrument sufficient in terms to transfer title or for a person purchasing mineral products to withhold payment of any rentals, royalties or other sums due to a party holding an interest in the minerals, or under the lease.

R.S. 30:106. A person producing minerals under a lease granted by the last record owner and holding under an instrument sufficient in terms to transfer title to the land or mineral rights, shall be presumed to have derived his right from the true owner. The lessor, royalty owner, lessee or producer or persons holding from them shall be entitled to all minerals produced or to their proceeds, unless and until a suit testing title of the

land or mineral rights embraced in the lease is filed in the district court of the parish in which the property is located.

B. A purchaser of minerals produced from a recorded lease granted under these conditions shall be fully protected in making payment to any party in interest under the lease unless and until the above mentioned suit should be filed and the purchaser receives notification of it by the usual postal registry receipt card. The purchaser shall not be entitled to this protection unless he has recorded in the conveyance records of the parish in which the land is located, notice that minerals have been and will be bought by him.

R.S. 30:107. A writ of mandamus to compel payment of whatever may be due to a party in interest under the circumstances set out in R.S. 30:105-30:106, or under any division order, may be issued by a court of competent jurisdiction against a person liable for the payment claimed. These proceedings shall be tried by preference.

R.S. 30:108. R.S. 30:105-30:106 shall not apply to minerals produced from lands belonging to the state.

APPENDIX B

Judgments and Opinions Below

1.

JUDGMENT OF THE DISTRICT COURT

JUDGMENT

(Number and title omitted) (Filed: Apr. 2, 1962)

This case came on for hearing in two phases, one held January 19, 1961, on a limited issue, the second December 12, 1961, as to all remaining issues. After full hearings, briefing by the parties and consideration by the Court, and for the reasons assigned in the opinions of the Court dated, respectively, April 3, 1961, and February 20, 1962;

IS ORDERED, ADJUDGED AND DECREED that there be judgment herein denying cancellation of that certain oil, gas and mineral lease dated December 19, 1953, granted by Noah S. Cutrer in favor of Humble Oil & Refining Company, recorded C.B. 172, Page 149, records of Plaquemines Parish, Louisiana, except to the extent, if any, as hereinafter qualified.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, on the assumption that the aforesaid lease nominally embraces some 1920 acres (for the purposes of this proceeding, title is not at issue and both parties have accepted that reading of the lease), as follows:

A. Defendant, Humble Oil & Refining Company, is granted fifteen (15) days from the date this judgment becomes final and executory within which to file with the Clerk of this Court, in duplicate, a recordable instrument releasing

from the above described lease, the following described property, to-wit:

> N 1/2 of NE 1/4 of Section 19, S 1/2 and NW 1/4 of Section 20, and such portions of the SW 1/4, NW 1/4 and SE 1/4 of Section 18 as may lie outside of the "joint area" hereinafter described: but excepting that portion of such property heretofore released by defendant by instrument dated October 21, 1958, recorded C.B. 210, Page 576; all situated in T. 17 S., R. 17 E., St. Helena Meridian, Southeastern Land District of Louisiana East of the Mississippi River;

its failure to do so within the delay stipulated shall ipso facto cause this judgment to operate as so releasing the property last described.

B. As respects the following described property, to-wit:

> Section 31; and Southwest Quarter of Section 19, and the South Half of the Northeast Quarter of Section 19, T. 17 S., R. 17 E.,

defendant is granted ninety (90) days from the date this judgment becomes final and executory to initiate (either directly or by someone acting by, through or under defendant) a development program thereon, and upon its failure to do so within that delay, said lease shall ipso facto terminate insofar as it covers and affects the last above described property, and defendant shall, within fifteen (15) days thereafter file with the Clerk of this Court, in duplicate, a recordable instrument, duly executed releasing the last above described property from the above described lease; its failure so to do within the delay stipulated shall ipso facto cause this judgment to operate as

so releasing the property last above described.

C. Upon this judgment becoming final and executory, defendant shall, subject to and in accordance with the provisions of said lease, make payments directly to plaintiffs for their accrued 5/48ths royalty interest (calculated according to the provisions of said lease), as well as such royalty interest thereafter accruing, as to production attributable to 57.36 acres of land area within those portions of Units 4, 5, 10, 11, 12, 16 and 17 (hereinafter mentioned) lying east of the west range line of T. 17 S., R. 17 E., and within the "joint area", said "joint area" being described as follows:

BEGINNING at a point in Black Bay in T 17 S- R 16 E, Southeastern Land District, East of the River, Plaquemines Parish, Louisiana, said point having Lambert State Plane Coordinate values of X = 2,566,825.92 and Y = 337,914.15;

THENCE, N 89° 06′ 30″ E, 1320.00 feet to a point having coordinate values of X = 2,568,166.30 and Y = 337,934.69;

THENCE, S 00° 53′ 30″ E, 1320.00 feet to a point having coordinate values of X = 2,568,166.30 and Y = 336,614.85;

THENCE, N 89° 06′ 30″ E, 2640.00 feet to a point having coordinate values of X = 2,570,805.98 and Y = 366,655.93;

THENCE, N 00° 53′ 30″ E, 2640.00 feet to a point having coordinate values of X = 2,570,785.00 and Y = 337,975.77;

THENCE, N 89° 06′ 30″ E, 2640.00 feet to a point having coordinate values of X = 2,573,425.12 and Y = 338,016.85;

THENCE, S 00° 53′ 30″ E, 1320.00 feet

to a point having coordinate values of X — 2,573,445.66 and Y — 336,697.01;

THENCE, N 89° 06′ 30″ E, 1320.00 feet to a point having coordinate values of X — 2,574,765.50 and Y — 336,717.55;

THENCE, S 00° 53′ 30″ E, 1320.00 feet to a point having coordinate values of X — 2,574,786.04 and Y — 335,397.71;

THENCE, S 89° 06′ 30″ W, 1320.00 feet to a point having coordinate values of X — 2,573,466.20 and Y — 335,377.17;

THENCE, S 00° 53′ 30″ E, 1320.00 feet to a point having coordinate values of X — 2,573,486.74 and Y — 334,057.33;

THENCE, S 89° 06′ 30″ W, 6600.00 feet to a point having coordinate values of X — 2,566,887.54 and Y — 333,954.63;

THENCE, N 00° 53′ 30″ W, 3960.00 feet to the point of beginning.

All bearings are grid bearings based on the Lambert State Plane Coordinate System, South Zone, Louisiana.

This description covers a joint area containing Units 1, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 as established by the Commissioner of Conservation, State of Louisiana by Order No. 437, dated October 20, 1958, and Orders Nos. 437-A and 437-B, dated December 8, 1958.

D. Upon this judgment becoming final and executory, defendant shall, subject to and in accordance with the provisions of said lease, make payment to the hereafter designated "Escrow Agent" of the sums represented by a royalty (calculated according to the provisions of said lease) of 7/64ths of production at-

tributable to the water bottoms (191 acres) within that portion of the "joint area" (as above described) and which lies east of the west range line of Township 17 South, Range 17 East. For this purpose The National Bank of Commerce in New Orleans is hereby constituted "Escrow Agent", and as such is an officer of this Court, and is to receive said funds as such, and subject to the further order of this Court, as hereafter provided; the sums to be deposited in the hands of the Escrow Agent shall be delivered by defendant to said Escrow Agent at least quarterly. The Escrow Agent shall promptly report to the Court any failure of the defendant to make a quarterly payment. The Escrow Agent shall invest such funds as come into its possession from time to time in Treasury notes of the United States, having maturities of not longer than one (1) year, and shall have full authority to reinvest in Treasury notes of like maturities the proceeds of any investment, as well as any interest received thereon. The Escrow Agent shall be under no responsibility to determine the correctness of the amounts transmitted to it by defendant, or to obtain the highest possible interest rate on investments made by it, and it shall not pay out any amount in said account except upon receipt of a certified copy of the order of this Court directing such payment. Upon receipt of a certified copy of an order of this Court directing any such payment, and obtaining the receipt of the party or parties to whom payment is directed to be made, the Escrow Agent shall be fully protected in making payment, in accordance with such order, of all or any portion of such escrowed funds and shall have no further responsibility to this Court or to the parties to this proceeding on account of any funds so paid, so long as the Escrow Agent acts in good

faith and without gross negligence; the Court retains jurisdiction of this cause for the purpose of rendering such further orders and decrees as may be appropriate looking toward the proper handling and distribution of the funds to be deposited in the Escrow account. All costs or fees of the Escrow Agent shall be borne by the funds deposited.

E. The demands of plaintiffs not herein specifically granted are denied.

F. Each party shall bear his or its own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this court retains jurisdiction of this case and over the parties for all purposes, and for the entry of such further orders and decrees as may be necessary or proper, and for such other proceedings as may, in the discretion of the court, appear appropriate.

Dated at New Orleans, Louisiana, this 30th day of March, 1962.

/s/ J. Skelly Wright,
United States District Judge

2.

OPINION OF THE DISTRICT COURT

OPINION OF THE COURT

(Number and title omitted) (Filed: Feb. 20, 1962)

Reuter. Reuter & Schott
Arthur C. Reuter
Attorneys for Plaintiffs

Milling, Saal, Saunders, Benson & Woodward
Andrew McCollam, Jr.
Haywood H. Hillyer, Jr.
Lawrence K. Benson
Bernard J. Caillouet
W. J. McAnelly, Jr.
Attorneys for Defendant

WRIGHT, District Judge:

This is the second phase[1] of a long controversy involving an oil and gas lease covering a portion of the West Black Bay field in Plaquemines Parish, Louisiana. Though others are actively interested in the area, the particular dispute here concerns only the landowners and their lessee, the Humble Oil & Refining Company. The lessors want their property returned free of the lease, which they say has expired or should be cancelled for many reasons. The defendant oil company, on the contrary, asserts the continuing vitality of the lease, but claims a right to withhold a substantial portion of the royalties apparently due thereunder until the plaintiffs' title is made secure.

The lease in suit, executed in December, 1953, nominally embraces some 1920 acres.[2] However, all but about

[1] See *Cutrer v. Humble Oil & Refining Company*, E.D. La., 192 F. Supp. 757. The sole issue tendered and decided on the initial trial was plaintiffs' demand for cancellation of the lease for nonpayment of all royalties allegedly due. That question was resolved in defendant's favor.

[2] This figure assumes that the lease description in terms of governmental quarter-sections intends to include all water bottoms as well as dry land found within the boundaries given, despite the recitation in both the lease and plaintiffs' title deed that only 445 acres are involved. Whatever the merits of the assumption, it may be indulged in for the purpose of this proceeding, since title is not at issue and both parties accept that reading of the lease.

The acreage involved, all in Township 17 South, Range 17 East, is: the NW 1/4, SW 1/4 and SE 1/4 of Section 18; the NE 1/4 and SW 1/4 of Section 19; the NW 1/4, SW 1/4 and SE 1/4 of Section 20; and all of Section 31. (According to their complaint, plaintiffs claim ownership of only the north half of the NW 1/4 of Section 20. Yet, the lease purports to cover the whole of that quarter-section.)

one hundred acres are submerged, and that is the source of the difficulty. For there is a serious question concerning the plaintiff's title to the minerals in the water bottoms, which would normally belong to the state.[3] Indeed, even before the lease in suit was entered into, the Gulf Oil Corporation, as a co-lessee from the State of Louisiana under an instrument which it interprets as covering most of the submerged areas here involved,[4] had already drilled producing wells on the leased premises and the state had accepted its royalties.

Under the circumstances, Humble has been understandably reluctant to explore the water bottoms within the lease until the matter is settled. It did nothing until almost the end of the five-year primary term. To keep the lease in force, it paid delay rentals, but postponed drilling. In the meantime Gulf expanded its operations and successfully developed a large portion of the contested area, until the pattern of its wells surrounded the eastern half of Stone Island, one of only two land masses within the lease.[5] At this point, in late 1953, the lease

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[3] See La. Act 727 of 1954, La. R.S. 9:1107, which declares that: "It has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership * * *." See also La. Const. 1921, Art. 4, § 2, La. Acts 106 of 1886, 110 of 1892, 121 of 1896, 153 of 1902, 52 of 1904, 189 of 1910, 54 of 1914, 139 of 1924, 258 of 1926, and 67 of 1932, insofar as here pertinent, now incorporated in La. R.S. 56:421; La. Act 258 of 1910, now La. R.S. 9:1101; *Comment*, 30 Tulane L. Rev. 115.

[4] The lease in question is that portion of Louisiana State Lease 195, originally dated February 28, 1928, bearing the designation "QQ," presently owned in equal shares by the Gulf Oil Corporation and the Estate of William Helis, Gulf being the operator. The lease covers all state lands and water bottoms in a large tract which includes the area here involved, except Section 31. It excludes "lands, beds and bottoms" "heretofore disposed of by the State," but Gulf evidently reads plaintiffs' 1911 patents from the state as conveying only the small landed areas within the description of their lease.

[5] The eastern half of Stone Island, containing about 57.36 acres, lies in Section 18, T17S, R17E. Plaintiffs' title thereto is not questioned. The only other land mass within the lease is a portion of a small island, about two miles south of Stone Island, in Section 31. Here again, plaintiffs' title is undisputed.

being about to expire, defendant entered into a joint operating agreement with the state's lessees for the development of Stone Island and the immediately surrounding water bottoms, unitized under orders of the Louisiana Department of Conservation.[6] Humble's participation in the portion of this "joint area" within the lease, about 250 acres, was calculated on the basis of the land area only, some 57 acres, on the ground that the water bottoms were excluded from the plaintiffs' lease and were covered by the state lease. Gulf was designated the operator and promptly drilled a well on the eastern half of the Island which was completed December 18, 1958, one day before the expiration of the primary term of the lease in suit.[7] While all oil sands have not yet been tapped, development of the joint area has progressed rapidly, dual wells having now been completed on each unit.[8]

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[6] Defendant initially attempted to obtain plaintiffs' consent to voluntary unitization of Stone Island and the surrounding water bottoms. Failing in that, the parties to the joint operating agreement applied to the Louisiana Conservation Commissioner for unitization orders. Since plaintiffs did not consent to it, the sharing formula incorporated in the agreement between Humble, Gulf and Helis in no way binds the plaintiffs. Indeed, that agreement itself so provides. Accordingly, there is no merit to plaintiffs' claim that Humble prejudiced their rights by joining in the operating contract with the State's lessees. Nor is the complaint concerning Gulf's presence on the leasehold within the joint area well taken in view of Humble's stipulated right to assign the lease. See also, La. C.C., Art. 2725. Defendant's executior of the joint operating agreement affords no basis for cancellation of the lease.

[7] The argument has been advanced that drilling and production by Gulf, rather than Humble, did not maintain the lease in effect beyond the primary term. But, since Gulf was acting, at least in part, as Humble's assignee, its operations must be attributed to the lessee.

The Louisiana Supreme Court having at length decided that a mineral lease is not a servitude and that the rule of *Lee v. Giauque*, 154 La. 491, 97 So. 669, is accordingly inapplicable, *Reagan v. Murphy*, 235 La. 529, 105 So. 2d 210, overruling *Arent v. Hunter*, 171 La. 1059, 133 So. 157, failure to drill non-contiguous tracts within the prescriptive period would not automatically work a forfeiture of the lease as to the detached areas. However, as later noted, the Louisiana rule that every portion of the leasehold must be developed under penalty of partial cancellation may often dictate the same result after expiration of the primary term.

[8] By May, 1959, dually-completed wells in the two lower sands were producing in each of the seven 40-acre units affected by the lease. Two shallower potentially productive sands are not yet drilled; but, in the absence of drainage, that accords with the usual practice. The doctrine of *Carter v. Arkansas Louisiana Gas Co.*, 213 La. 1028, 36 So. 2d 26, and subsequent cases, to the effect that a lessee must test and develop every

Continued

Just after execution of the joint operating agreement, Humble released to the plaintiffs some 80 acres of water bottoms adjacent to the joint area which Gulf had already developed. And shortly thereafter the plaintiffs filed an ejectment proceeding in a Louisiana court[9] to evict Gulf from this acreage and other portions of the lease in suit,[10] including the joint area. As to the water bottoms,[11] Gulf defends asserting a right to possession under the state lease. The controversy still pends. In still other proceedings in another state court,[12] the present plaintiffs sought to quiet their title as against a group of persons and corporations, referred to as the Perez group, who claimed all of the acreage here involved under tax sales and had granted a mineral lease to Helis. In this they succeeded, obtaining a consent judgment recognizing their ownership in return for conceding their opponents small mineral royalties.[13] And, a month thereafter, on March 9, 1959,

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[8] (Continued)
part of the leasehold, regardless of what a prudent operator would do, under penalty of partial cancellation, has not yet resulted in horizontal cancellation of a lease, and this court will not initiate that novel application. See Conger, the Evolution of the Further Development Requirement Under Mineral Leases, in *Seventh Annual Institute on Mineral Law* (L.S.U. 1960), 149, 169.

[9] *Noah S. Cutrer and Nicholas D. Olivier v. Gulf Oil Corporation* Civil District Court for the Parish of Orleans, Louisiana, No. 366-650, filed November 13, 1958.

[10] The demand covers the three quarter-sections of Section 18 within the lease. For reasons not explained, the suit does not seek to evict Gulf from those portions of the lease in Sections 19 and 20 which that company is developing.

[11] While Gulf's supplemental answer in that proceeding, filed here only on the second trial, does not distinguish between its right to explore Stone Island and its right to explore the surrounding water bottoms in the joint area, that company's steadfast position appears to be that it holds the water bottoms under the state lease, and not as operator for Humble under plaintiffs' lease. It is on this basis that, together with Helis, it receives all production attributable to the water bottoms, to the exclusion of Humble, under their joint operating agreement.

[12] *Noah S. Cutrer, et al. v. Manning Oil Corporation*, 23rd Judicial District Court for the Parish of Plaquemines, Louisiana, Nos. 4737, 4738, filed July 16, 1958.

[13] Helis, the lessee from the Perez group, was not joined in the suit and his lease was not mentioned in the consent decree. Later, by quitclaim, plaintiffs purchased from the Perez group their rights as lessors under this instrument. Apparently able to convince Humble of the continuing vitality of the Perez lease, Helis subsequently obtained from Humble a one-sixth interest in the production attributable to the portion of Stone Island within plaintiffs' lease.

they filed the instant suit. About a week later, defendant tendered plaintiffs the royalties attributable to the landed portions of the lease within the joint area.[14] They were refused, as they have been on the occasion of a more recent tender. And there the matter rests.

Under the uncontroverted facts, it is perfectly clear that Humble has in effect disclaimed all interest in those portions of the leased premises lying outside the joint area. It never received possession of one large area of water bottoms, Gulf having already developed the tract before the lease in suit was entered into.[15] Though defendant probably could have attempted to evict the state's lessee,[16] so could the plaintiffs, and it was clearly their duty to do so.[17] Other water bottoms were only developed by Gulf after Humble obtained its lease.[18] As to these it can be said that Humble abandoned the premises to the adverse possessor or, on the other hand, that plaintiffs failed to defend their lessee's possession, as they should have.[19] But it does not matter who was right and who wrong. All areas presently under development by Gulf have, as a matter of fact, escaped from the lease. Equity requires that they be formally released to the plaintiffs free of the incumbrance. And since Humble

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[14] Plaintiffs' complaints with respect to the timing and form of this tender have already been rejected. See *Cutrer v. Humble Oil & Refining Company, supra*, 192 F. Supp. 757, n. 1.

[15] By December, 1953, Gulf had completed six producing wells scattered over the three quarter-sections of Section 20 within plaintiffs' lease.

[16] See La. R.S. 9:1105; La. C. Civ. P. Art. 3364.

[17] See La. C.C. Arts. 2692, 2704.

[18] These are the portions of the leasehold in Section 18 outside the joint area (including the tract later released), the northern portion of the NE 1/4 of Section 19, and the water bottoms in Section 20 not yet developed by Gulf.

[19] See La. C.C. Arts. 2692(3), 2704.

Despite plaintiffs' denial, the evidence makes it clear that they knew of Gulf's encroachments. Accordingly, the rule of La. C.C. Art. 2724, is inapplicable, and Humble cannot be held accountable for minerals removed by Gulf. Plaintiffs' demand in this particular must be denied, without prejudice, of course, to a proper action against Gulf.

obviously cannot fulfill its lease obligations with respect to these water bottoms within the foreseeable future, there is no reason to delay the declaration of a release.

The situation is a little different, however, with respect to those portions of the leasehold outside the joint area which no one has developed. These are primarily two non-contiguous tracts, one of which includes part of an Island undisputedly owned by the plaintiffs.[20] They are unproven areas. Indeed, there is no evidence whatever that prudent development of the lease would require drilling there at this time, and no witness was produced to say that he would drill.[21] Nevertheless, under the now settled jurisprudence of Louisiana, Humble has an obligation to explore within a reasonable time or suffer a partial cancellation of its lease.[22] Normally, that penalty would be assessed without further ado in view of the long delay since the expiration of the primary term and demand.[23] And this perhaps even in the face of the "judicial ascertainment clause."[24] But here, by filing this suit asserting forfeiture of the lease on several grounds within three months after the expiration of the primary term,

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[20] The unexplored areas are:

(1) Section 31, detached from the rest of the leasehold, which includes perhaps 50 acres of land;

(2) The SW 1/4 of Section 19, which touches the main lease area at one corner only; and

(3) The southern half of the NE 1/4 of Section 19.

[21] See *Carter v. Arkansas Louisiana Gas Co., supra; Romero v. Humble Oil & Refining Co.*, E.D. La., 93 F. Supp. 117, modified and affirmed, 5 Cir., 194. F. 2d 383.

[22] *Eota Realty Co. v. Carter Oil Co.*, 225 La. 790, 74 So. 2d 30; *Wier v. Grubb*, 228 La. 254, 82 So. 2d 1; *Nunley v. Shell Oil Company*, 229 La. 349, 86 So. 2d 62, affirming, La. App., 76 So. 2d 111; *Sohio Petroleum Company v. Miller*, 237 La. 1015, 112 So. 2d 695; *Middleton v. California Company*, 237 La. 1039, 112 So. 2d 704.

[23] Unlike *Salyer v. California Company*, E.D. La., 164 F. Supp. 287, affirmed, 5 Cir., 262 F. 2d 589, there was here no drilling by the lessee in the immediate vicinity of the undeveloped portion of the leasehold. Nor was there even exploration, combined with a long-range development plan which would ultimately include the contested area, as in *Middleton v. California Company, supra.*

[24] See *Melancon v. Texas Company*, 230 La. 593, 89 So. 2d 135, 146.

plaintiffs have confused the picture, and defendant should be given a clear opportunity to develop the lease free of doubt concerning its continued vitality. Accordingly, Humble will be granted ninety days to initiate a development program affecting the unexplored portions of the leasehold outside the joint area.[25]

There remains the tract of land and water bottoms now being developed under the joint operating agreement between Humble and the state's lessees.[26] Here Humble cannot say that it was denied possession, since no part of the joint area was held by Gulf at the time the operating agreement was entered into. Whether defendant could, or could not, have developed it peacefully without entering into an arrangement with the state's lessees we will never know. But, at least, Humble cannot now label Gulf's possession adverse, and we must treat Gulf merely as the operator developing on behalf of Humble. Why then should Humble not pay full royalties to plaintiffs on all minerals removed from the area? Because, says Humble, the water bottoms in the joint area[27] are "claimed" by the state and the lease expressly provides for the withholding of royalties attributable to such portions of the premises as are "claimed by others" "until final determination of the lessor's rights."

In an earlier opinion,[28] this court refused to cancel the lease on account of the withholding of royalties from

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[25] See *Fontenot v. Texas Company*, 5 Cir., 266 F. 2d 956, modifying and affirming, W.D. La., 168 F. Supp. 36.

[26] The joint operating agreement affects the whole of Stone Island and surrounding waters. But the plaintiffs are interested only in that portion of the joint area lying east of the range line in Section 18, T17S, R17E. The term "joint area" as here used refers to that portion alone.

[27] The "claim" to water bottoms is not limited to those in the joint area. But, since this is the only portion of the leasehold presently under development by Humble, or for the account of Humble, no question arises concerning the right to withhold royalties attributable to water bottoms outside the joint area.

[28] See Note 1, *supra*.

the submerged portions of the joint area. That ruling was based on the finding that Humble's refusal to pay the royalties was at worst erroneous. But the question whether royalties attributable to the water bottoms were actually due was left open. Now, in the light of new evidence,[29] and on fuller consideration, the court is persuaded that defendant should not be compelled to assume the risk of making these royalty payments until plaintiffs' title to the submerged portions of the lease is confirmed.

As already noted after the first hearing in this matter,[30] the language of the state lease itself is ambiguous in excluding from its coverage all lands and water bottoms "heretofore disposed of." But the state's lessees, with their landlord's concurrence have made it plain that they interpret this provision as excepting only the land areas involved. And that contention is far from frivolous. Indeed, considering the ambiguity of the description in plaintiffs' title[31] in the light of the constitutional and statutory impediments to alienation of water bottoms[32] existing at the time plaintiffs' ancestors obtained their patents, it may be they never acquired the submerged portions of the lease. Gulf is apparently so sure of the state's title to these water bottoms that it had not

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[29] Especially Gulf's supplemental and amended answer in the pending state court proceedings, see Note 9, *supra*, asserting a right under the lease from the State of Louisiana.

[30] See *Cutrer v. Humble Oil & Refining Company*, *supra*, 192 F. Supp. 758.

[31] See Note 2, *supra*. The advertisements and the sheriff's deed covering the public sale to plaintiffs' ancestors in title, just prior to issuance of the patents in 1911, also recite only 445 acres. The only plat then extant, approved in 1848, shows a lesser land area.

[32] See Note 3, *supra*. It is not at all clear that the rule of *California Co. v. Price*, 225 La. 706, 74 So. 2d 1, and its progeny, quiets plaintiffs' title to all the water bottoms within the 1920 acre description of the patents. It may be that only the 445 acres apparently then thought to be above water are protected. Moreover, any portion of that acreage which became submerged after issuance of the patents in 1911 presumably reverted to public ownership. See *Miami Corporation v. State*, 186 La. 784, 173 So. 315.

hesitated to drill areas nominally covered by plaintiffs' lease, and Humble is so doubtful of its lessors' title that it has, as a practical matter, abandoned its claim to them, at least in the joint area.

All this, however, does not necessarily mean that an adverse "claim" exists within the meaning of the lease provision. On the contrary, as indicated in a prior opinion, that term must probably be understood restrictively as including only a claim judicially asserted,[33] and Gulf's answer in the state court eviction suit asserting the state's title to the water bottoms may not be sufficient. Nevertheless, because there is no protection for a mineral lessee who pays royalties erroneously on minerals produced from state lands,[34] and because the state proceedings presently pending between plaintiffs and Gulf may soon resolve the basic title question, defendant should not now be required to pay over to the plaintiffs royalties attributable to the submerged acreage within the joint area. Equity, however, requires that these royalties be paid into escrows, under mutually agreeable provisions for investment of the funds. Accordingly, as soon as an escrow plan can be established, Humble will deliver all accrued royalties attributable to the joint area water bottoms within the lease, and will henceforth pay into that fund all such royalties,[35] at least quarterly, until such time as the plaintiffs' title is quieted or defeated, or until the further orders of the court. The court will retain jurisdiction of the case for reconsideration should

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[33] *Cutrer v. Humble Oil & Refining Company*, *supra*, 192 F. Supp. 758, n. 4.

[34] The protection afforded mineral lessees on private lands when they pay royalties to the record owner, absent a judicially asserted adverse claim, La. R.S. 30:105, 30:106, is expressly withheld in the case of state lands. La. R.S. 30:108.

[35] Both accrued and future royalties attributable to the landed portions of the joint area within the lease in suit should, of course, be paid directly to the plaintiffs.

anything prevent a prompt adjudication of the title question by the state tribunals.[36]

/s/ J. Skelly Wright,
United States District Judge

New Orleans, Louisiana
February 20, 1962

3.

OPINION OF THE DISTRICT COURT (INTERLOCUTORY JUDGMENT)

OPINION OF THE COURT

(Number and title omitted) (Filed: Apr. 3, 1961)

Reuter, Reuter & Schott
J. Richard Reuter, Jr.
Arthur C. Reuter
Attorneys for Plaintiffs

Bernard J. Caillouet
W. J. McAnelly, Jr.
Charles Janvier
Andrew McCollam, Jr.
H. H. Hillyer, Jr.
L. K. Benson
Attorneys for Defendant

WRIGHT, District Judge:

This dispute arises under an oil and gas lease covering substantial acreage, most of it submerged, in and around Stone Island in Plaquemines Parish, Louisiana.

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[36] It may be that the fundamental title question cannot be resolved in that proceeding against one of the state's lessees. Though the lessor, the State Mineral Board, is amenable to suit, La. R.S. 30:121; *Texas Co. v. State Mineral Board*, 216 La. 742, 44 So. 2d 841, the state itself, presumably immune in the absence of consent, is perhaps an indispensable party in the title dispute. See *Daigle v. Pan American Production Company*, 236 La. 578, 108 So. 2d 516.

Production having occurred, plaintiffs, as landowners and lessors, now seek cancellation of the lease and an accounting for the minerals removed, or, in the alternative, a decree compelling the defendant oil company to pay royalties for all production from the leased premises. At this stage of the proceeding, however, the only question tendered, and the only one decided, is whether cancellation should be awarded on account of failure to pay royalties.

Humble has offered to pay all royalties[1] due under the lease attributable to the landed portion of the described premises but says it is entitled to withhold payments attributable to production from the submerged areas because these are adversely claimed by the State of Louisiana.[2] It invokes a clause of the lease which provides:

> "• • • in the event the land above described, any part thereof, or an interest therein or in the royalties payable hereunder is claimed by others, Lessee shall have the right to withhold without liability for interest thereon payment of royalties on production therefrom or to deposit such royalties in the registry of a court of competent jurisdiction until final determination of Lessor's rights."

The underlying question is, of course, whether the State has "claimed" title to the submerged portions of the Cutrer lease within the meaning of this provision.

The State lease, nominally including all water bottoms in the contested area, of itself provides no answer, for it expressly excludes all acreage "heretofore disposed

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[1] Some question has been raised over the timing and form of defendant's tender of these royalties. Under the circumstances, the offer of royalties was made within a reasonable time after Humble was given notice of settlement of a controversy in the state courts involving title to the land portion of the leased premises. Likewise, the tender in money, rather than oil, was sufficient in view of the lessee's option to purchase the oil at source.

[2] The State of Louisiana has granted a mineral lease to third parties covering an area which includes the acreage in suit.

of by the State," and the plaintiffs here claim under a chain of title from the State antedating the State lease. On the other hand, the State has accepted royalties from its lessees for production from some areas covered by the Cutrer lease and has sanctioned an agreement between defendant and its own lessees[3] for a joint operation of the area immediately surrounding Stone Island which, at least impliedly, asserts its claim to the submerged portions. Yet all of this has been more passive acquiescence than the positive assertion of a claim, and neither the State nor those holding under it have initiated judicial proceedings to clear title. In the circumstances, plaintiffs say that no "claim" has been advanced within the meaning of the lease and that there is, accordingly, no excuse for defendant's withholding royalty payments.

The question is a close one, but, in view of the Louisiana policy against allowing the withholding or royalties on the basis of an adverse claim not judicially asserted,[4] plaintiffs are probably right. For the present, however, that issue may be left unresolved. Humble's position is, at worst, erroneous. There is no proof in the record as presently made up that it acted in bad faith. Until there is it should not be penalized through the harsh sanction

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[3] Plaintiffs were not parties to this joint operating agreement.

[4] See Act 64 of 1934, La. R.S. 30:105 *et seq.*, which as interpreted by the Louisiana courts (see, e.g., *State v. Hoy Producing Co.*, La. App., 167 So. 506, 510-511; *State v. Louisiana Oil Refining Corporation*, La. App., 176 So. 686, 690, affirmed sub. nom. *Arkansas Oil Co. v. Louisiana*, 304 U.S. 197, 200-201; *State v. Caddo Crude Oil Purchasing Corporation*, La. App., 189 So. 333, 336-337; *State v. United Gas Public Service Co.*, 197 La. 616, 2 So. 2d 41, 43-44), declares "unlawful" the lessee's withholding royalty payments because of an adverse claim unless and until that claim has been judicially asserted. While the statute is inapplicable "to minerals produced from lands belonging to the state," La. R.S. 30:108, it may be doubtful whether Humble, in this case, can properly deny its lessor's title and claim the benefit of this exemption. Whether the provisions of the statute can be avoided by agreement is an open question.

Though not strictly applicable, the following decisions of the Louisiana courts confirm a hostile policy toward withholding of oil royalties: *Texas Co. v. State Mineral Board*, 216 La. 742, 44 So. 2d 841; *Irion v. Standard Oil Co. of Louisiana*, 199 La. 363, 6 So. 2d 143.

of cancellation. Where, as here, "there are grounds for honest doubt as to the rights of the parties," that remedy is inappropriate. *Midstates Oil Corp. v. Waller*, 5 Cir., 207 F. 2d 127, 131; *Rudnick v. Union Producing Co.*, 209 La. 943, 25 So. 2d 906, 908. See also, *Sohio Petroleum Co. v. V. S. & P. R. R.*, 222 La. 383, 62 So. 2d 615.

Accordingly, there will be judgment denying plaintiff's prayer for cancellation of their lease in favor of defendant on account of non-payment of royalties, without prejudice, however, to the renewal thereof.

/s/ J. Skelly Wright
United States District Judge

New Orleans, Louisiana
April 3, 1961

4.

JUDGMENT OF THE COURT OF APPEALS

(Number and title omitted)

Before Hutcheson, Cameron and Jones, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, Humble Oil & Refining Company, be condemned

to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 28, 1962

5.

OPINION OF THE COURT OF APPEALS

(Number and title omitted)

(November 28, 1962)

Before HUTCHESON, CAMERON, and JONES, Circuit Judges.

PER CURIAM: Finding ourselves in accord with the findings and conclusions of the district court as set forth in its opinion,[1] we affirm its judgment for the reasons which it has assigned.

AFFIRMED.

6.

DENIAL OF PETITION FOR REHEARING

(Number and title omitted)

(December 27, 1962)

ON PETITION FOR REHEARING

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

PER CURIAM

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cases be and the same is hereby DENIED.

[1] Cutrer v. Humble Oil & Refining Company, 202 F. Supp. 568.

APPENDIX C

EXCERPTS FROM PERTINENT DOCUMENTS

I. PARAGRAPH 10 OF OIL, GAS AND MINERAL LEASE GRANTED BY NOAH S. CUTRER IN FAVOR OF HUMBLE OIL & REFINING COMPANY, DATED DECEMBER 19, 1953, (EXHIBIT H-3):

> **Lessor hereby warrants and agrees to defend the title** to said land and agrees that Lessee at its option may discharge any tax, mortgage, or other lien upon said land either in whole or in part and in event Lessee does so it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty it is agreed that if Lessor owns less than the entirety of the mineral rights on in or under said land then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce rental paid hereunder shall not impair the right of Lessee to reduce royalties. Should any interest in said land be claimed adversely to Lessor, Lessee shall have the right to acquire such interest or a lease or leases thereon and in event of failure of title Lessor shall not be entitled to royalties on any such interest which is not owned by him; and **in the event the land above described, any part thereof, or an interest therein or in the royalties payable hereunder is claimed by others, Lessee shall have the right to withhold without liability for interest thereon payment of royalties on production** therefrom or to deposit such royalties in the registry of a court of competent jurisdiction **until final determination of Lessor's rights.** (Emphasis added.)

II. EXCERPT FROM PARAGRAPH XIII OF SUPPLEMENTAL AND AMENDED ANSWER OF GULF OIL CORPORATION IN PROCEEDING NO. 366,650 OF THE DOCKET OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA (EXHIBIT H-96):

And now further answering, defendant shows that:

(a) Under instrument dated February 20, 1928, the State of Louisiana granted an oil, gas and mineral lease (being State Lease No. 195) to M. Hession, which lease covered and affected State owned lands, beds and water bottoms, as more fully described therein, and thereafter, and prior to the acts complained of by plaintiffs in their petition, as amended, State Lease No. 195 was acquired by the predecessors in title of defendant and the Estate of William G. Helis, a Partnership, which said State lease is now in full force and effect, having been maintained by the payment of rentals and/or the continuous production of minerals during and since the primary term to date, and said State Lease No. 195 is now owned by defendant and the Estate of William G. Helis, a Partnership, insofar as it now relates to the area affected by these proceedings, all by virtue of the following:

(References to chain of title omitted.)

(b) The State of Louisiana, represented by the State Mineral Board, executed an instrument dated May 15, 1958, with reference to Gulf Oil Corporation, the Estate of William G. Helis and State Lease No. 195 and which had attached thereto a plat marked "Exhibit A", a copy of which instrument and plat is annexed hereto and made a part hereof as Exhibit "D-12".

(c) Defendant further avers that any land within the area claimed by plaintiffs in these proceedings, which at the time of the execution of State Lease No. 195 formed a part of the beds and

bottoms of navigable waters, **has continued to be owned and is now owned by the State of Louisiana subject to State Lease No. 195.** (Emphasis added.)

* * * * *